Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

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U.S. Customs Service

Treasury Decisions

19 CFR Part 162

(T.D. 86-119)

Customs Regulations Amendments Relating to Prior Disclosures of Violations of 19 U.S.C. 1592

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to provide for further clarifications and changes to the regulations relating to prior disclosures of violations of 19 U.S.C. 1592. The document provides that a person is presumed to have knowledge of the commencement of a formal investigation of a violation if, before the claimed prior disclosure of the violation, an import specialist, regulatory auditor, inspector, or other Customs officer, having reasonable cause to believe that there has been a violation of 19 U.S.C. 1592, so informed the person concerning the type of or circumstances of the disclosed violation. However, this presumption may be rebutted by evidence that notwithstanding the notice, the person did not have such knowledge.

This change is necessary to provide for more effective enforcement of the regulations concerning 19 U.S.C. 1592 violations.

EFFECTIVE DATE: July 25, 1986.

FOR FURTHER INFORMATION CONTACT: Charles D. Ressin, Commercial Fraud & Negligence Penalties Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229, (202-566-8317).

SUPPLEMENTARY INFORMATION:

Background

Section 592, Tariff Act of 1930, as amended (19 U.S.C. 1592), provides for penalties and penalties procedures when by fraud, gross negligence or negligence, merchandise is entered, introduced, or attempted to be entered or introduced into the commerce of the U.S.,

by means of any material false document, written or oral statement or act, and/or any material omission; or when a person aids or abets any other person in the entry, introduction, or attempted entry or introduction of merchandise by such means.

Section 618, Tariff Act of 1930, as amended (19 U.S.C. 1618), provides for the remission or mitigation of fines, penalties, and forfeitures by the Secretary of the Treasury.

By T.D. 84-18, published in the Federal Register on January 13, 1984 (49 FR 1672), Customs amended Part 162, Customs Regulations (19 CFR Part 162), relating to § 592 penalty and penalty procedures to, among other things, clarify the requirements and criteria applicable to prior disclosures of violations of § 592. As amended by T.D. 84-18, § 162.74(a), Customs Regulations (19 CFR 162.74(a)), provides that a prior disclosure may be made if the person concerned discloses the circumstances of a violation in writing to the district director before, or without knowledge of, the commencement of a formal investigation, and makes a tender of any actual loss of duties. Experience gained since then, however, reveals that further clarification and changes to § 162.74 are needed.

Section 162.74(f), Customs Regulations (19 CFR 162.74(f)), as amended by T.D. 84-18, provides that a person who claims lack of knowledge of the commencement of a formal investigation has the burden to prove that lack of knowledge. Pursuant to this section, a person is presumed to have had knowledge of the commencement of a formal investigation of a violation of § 592 if before the claimed prior disclosure of the violation:

(1) An investigating agent, having properly identified himself and the nature of his inquiry, had, either in person or in writing, made an inquiry of the person concerning the type of or circumstances of the disclosed violation; or

(2) An investigating agent, having properly identified himself and the nature of his inquiry, requested specific books and records of the person relating to the disclosed information.

The presumption of knowledge may be rebutted by evidence that, notwithstanding the inquiry or request, the person did not have knowledge that an investigation had commenced with respect to the disclosed information.

Section 162.74(f) is subject to the interpretation that the presumption of knowledge of the commencement of a formal investigation is limited to those circumstances where a Customs investigating agent, and not other Customs personnel, notifies the person of the type of or circumstances of a violation of § 592. To provide for more effective enforcement of the prior disclosure regulations, by notice published in the Federal Register on July 8, 1985 (50 FR 27829), Customs proposed that this presumption be extended to those circumstances where an import specialist, regulatory auditor, inspector, or other customs officer, having reasonable cause to believe that there has been a violation of § 592, so notifies the

person(s) concerning the type of or circumstances of the disclosed violation. It was proposed that § 162.47(f) be amended to include this provision.

Section 162.74(g), Customs Regulations (19 CFR 162.74(g)), as amended by T.D. 84–18, provides that a prior disclosure may not be made after a determination by an authorized Customs officer that there is reasonable cause to believe that there has been a violation of § 592 and that a claim for monetary penalty shall be issued without commencement of a formal investigation. Such determination is evidenced by any one or more of the following:

(1) By the issuance of a pre-penalty notice;

(2) By the issuance of a penalty notice if a pre-penalty notice is not required;

(3) In the case of violations involving merchandise accompanying persons entering the U.S. or commercial merchandise inspected in connection with entry, by oral notification to the person of the officer's finding of a violation; or

(4) In the case of the seizure of merchandise under § 592, by the act of seizure.

It was determined that the existing wording of this regulation unduly restricted Customs in the performance of its enforcement duties. The determination as to whether there exists reasonable cause to believe a violation of § 592 has occurred appeared to be limited to only certain authorized Customs officers. Often, however, this determination can be made by any Customs officer. Furthermore, § 162.74(g)(3) was limited to situations which generally involve only inspectors, thus denying other Customs officers who may have detected the violation from providing oral or written notification to the violator.

To remedy this problem, Customs proposed that § 162.74(g) be amended to clarify that a prior disclosure will be precluded, notwithstanding the fact that a formal investigation has not been commenced, after *any* Customs officer determines that there is a violation of § 592, and gives notice as evidenced by the four outlined circumstances. The violator, however, would still be allowed to make a prior disclosure of the circumstances of a violation which has not been discovered by Customs.

It was also noted in the proposal that § 162.74, as amended by T.D. 84–18, contained an error in paragraph (a)(1), in which parenthetical reference was made to § 162.71(e) of "§ 592, Tariff Act of 1930, as amended (19 U.S.C. 1592)". It was proposed that the reference to § 592 inside the parenthesis be removed and a reference to Part 162 inserted, in its place. The correct reference in the parenthesis should be to § 162.71 of Part 162.

In response to a request, by notice published in the Federal Register on September 9, 1985 (50 FR 36603), the time for the submission of comments on the proposal was extended from September 6, 1985, to October 6, 1985. Thirteen comments were received in re-

sponse to the notice proposing the changes. A discussion of the comments and our responses follow:

Discussion of Comments

Comment: Eight commenters stated that the proposed § 162.74(g) goes beyond the authority of Customs as established by § 592. They claimed that Customs proposal to disallow a finding of prior disclosure notwithstanding the fact that a formal investigation has not been commenced and to broaden the commencement of a formal investigation to a notice, written or oral, given by any Customs officer who has reasonable cause to believe that a violation of § 592 has occurred, rather than by a Customs agent, is without legal authority. Further, they aver that Congress mandated that a formal investigation is required before the availability of the prior disclosure program is precluded.

Response: After careful consideration of the matter, we have determined not to amend § 162.74(g). Accordingly, it is unnecessary to discuss the comments relating solely to this issue.

Comment: One commenter asked what individuals were included in the phrase "other Customs officers" in proposed § 162.74(f)(1).

Response: The phrase includes the district director, the fines, penalties and forfeiture officer, and any other Customs officer who may be authorized to contact an alleged violator concerning a violation.

Comment: A commenter stated that if a Customs officer determines at the time of importation that there has been a violation of § 592, the importer should be informed and given the opportunity to develop the facts and submit a voluntary disclosure.

Response: We disagree. An importer so informed should not be entitled to the benefits of prior disclosure. However, the importer's cooperation with Customs would be considered as a mitigating factor in any penalty action against the importer.

Comment: Two commenters requested to know by what means a person may be notified by a Customs officer of a violation of § 592, under the provisions of proposed § 162.74(f)(1). Specifically, they wanted to know whether these means were the same as those listed in proposed § 162.74(g) for notifying an alleged violator of a § 592 violation.

Response: Section 162.74(g) states that a prior disclosure of the circumstances of a violation of § 592 is precluded after a determination by any Customs officer that there is reasonable cause to believe that such violation has been committed. This determination is evidenced by (1) the issuance of a pre-penalty notice; (2) the issuance of a penalty notice if a pre-penalty notice is not required; (3) oral or written notification to the alleged violator by the Customs officer who detected the violation; or (4) the act of seizure, under § 592(c)(5), of the merchandise involved in the violation. Notice under § 162.74(g) is limited to these four means.

However, because § 162.74(f)(1) involves only the circumstance wherein a Customs officer may *presume* knowledge on the part of an alleged violator, of the commencement of a formal investigation of the violation, notice under § 162.74(f)(1) can be effected by any means of oral or written communication. In this situation, Customs sees no reason to limit the method of notification.

Comment: It was stated that proposed § 162.74(f)(1) expands the role of Customs officers by making them investigation agents. This curtails the exchange of useful information between Customs officers and importers and is an unnecessary extension of Customs enforcement capabilities.

Response: We disagree. We are unpersuaded that allowing other Customs officers to presume knowledge of a violation of § 592 on the part of an alleged violator, and to notify that violator, curtails the exchange of information between Customs and importers. We believe that the proposal provides more effective enforcement of the regulations.

Comment: Under proposed § 162.74(f)(1), it is claimed that if an import specialist orally informs an importer that certain conduct on his part constituted a violation of § 592, the importer is presumed to have knowledge of the commencement of a formal investigation even though there was no such investigation opened under § 162.74(d). The presumption should begin to operate only if, in fact, a formal investigation has already been commenced.

Response: We disagree. Before a person can be presumed, under § 162.74(f)(1), to have had knowledge of the commencement of a formal investigation, the following events must have occurred:

(1) the violator must have made a disclosure of the circumstances of the violation;

(2) there must have been, prior to the disclosure, a commencement of a formal investigation; and

(3) one of the means of communication set forth in paragraph (f)(1) concerning the type of or circumstances of the disclosed violation must have occurred. It is not relevant whether the communication of the circumstances of an alleged § 592 violation is made to an importer before or after the commencement of a formal investigation. If the communication took place, there is an inference that the importer should have known, at the time of making the disclosure, that an investigation had commenced, or that there is a likelihood that an investigation would be commenced.

Comment: It was also claimed that if §§ 162.74(f) and 162.74(g) were amended as proposed, the two would cease to have any practical distinction. Under proposed paragraph (f)(1), an importer would lose his right to make a prior disclosure if a Customs officer had reasonable cause to believe that there had been a violation of § 592 and so informed the importer. Under proposed paragraph (g)(3), the importer would lose his right to make a prior disclosure if the Cus-

toms officer determined that there was reasonable cause to believe that a violation of § 592 had occurred and so notified the importer.

Response: We disagree. We believe there is a distinction between paragraphs (f) and (g). In the commenter's discussion of paragraph (g)(3), the importer would be precluded from making a prior disclosure of the circumstances of a § 592 violation because a Customs officer has (1) made a determination that there is a reasonable cause to believe a violation has occurred, (2) determined that a claim for a monetary penalty will be issued, without commencement of a formal investigation, and (3) notified the violator by any of the means set forth therein. In the commenter's discussion of paragraph (f)(1), the importer has made a disclosure of the circumstances of a violation after the investigation has commenced. The violator is only presumed to have knowledge that a formal investigation has been commenced. He may rebut this presumption and still be accorded the benefits of prior disclosure. In addition, Customs must establish that an investigation has commenced. To clarify that issue, we are amending the last sentence of § 162.74(f) to include this new presumption among those subject to rebuttal.

Comment: One commenter raised questions relating to the interpretation of the prior disclosure regulations such as what constitutes constructive knowledge and what constitutes reasonable cause to believe that a violation of § 592 has been committed.

Response: Since these issues are beyond the scope of the proposal, they are not appropriate for our consideration in this document. The information this commenter seeks is available through general legal research. In addition, he may avail himself of Customs legal precedent retrieval system keyword directory, which is available at all district and regional Customs offices.

Determination

After careful analysis of the comments received, and further review of the matter, it has been determined advisable to adopt the proposal with the modifications discussed above.

As discussed in the proposal, § 162.74, as amended by T.D. 84-18, contains an error in paragraph (a)(1), in which parenthetical reference is made to "§ 162.71(e) of section 592, Tariff Act of 1930, as amended (19 U.S.C. 1592)". The reference to § 592 inside the parenthesis is being removed and a reference to Part 162 inserted, in its place. The correct reference in the parenthesis is to § 162.71 of Part 162.

Regulatory Flexibility Act

The provisions of the Regulatory Flexibility Act, relating to an initial and final regulatory flexibility analysis (5 U.S.C. 603, 604), are not applicable to these amendments because they will not have a significant impact upon a substantial number of small entities. Accordingly, it is certified under the provisions of § 3 of the Regula-

tory Flexibility Act (5 U.S.C. 605(b)), that this rule will not have a significant economic impact on a substantial number of small entities.

Executive Order 12291

These amendments do not meet the criteria for a "major rule" as defined by § 1 of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

Drafting Information

The principal author of this document was Susan Terranova, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

List of Subjects in 19 CFR Part 162

Customs duties and inspection, Administrative practice and procedures, Penalties.

Amendments to the Regulations

Part 162, Customs Regulations (19 CFR Part 162), is amended as set forth below.

PART 162—RECORDKEEPING, INSPECTION, SEARCH, AND SEIZURE

1. The authority citation for Part 162 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1624.

Subpart G also issued under 19 U.S.C. 1466, 1584, 1592, 1613, 1618.

2. Section 162.74(a)(1) is amended by removing the words "section 592, Tariff Act of 1930, as amended (19 U.S.C. 1592)" inside the parenthesis, and inserting, in their place, the words "this Part."

3. Section 162.74(f) is revised to read as follows:

§ 162.74 Prior disclosure.

* * * * * * *

(f) *Proof of lack of knowledge.* A person who claims a lack of knowledge of the commencement of a formal investigation has the burden to prove that lack of knowledge. A person shall be presumed to have had knowledge of the commencement of a formal investigation of a violation if before the claimed prior disclosure of the violation:

(1) An import specialist, regulatory auditor, inspector or other Customs officer, having reasonable cause to believe that there has been a violation of 19 U.S.C. 1592, so informed the person concerning the type of or circumstances of the disclosed violation; or

(2) An investigating agent, having properly identified himself and the nature of his inquiry, had, either in person or in writing, made an inquiry of the person concerning the type of or circumstances of the disclosed violation; or

(3) An investigating agent, having properly identified himself and the nature of his inquiry, requested specific books and records of the person relating to the disclosed information.

The presumption of knowledge may be rebutted by evidence that, notwithstanding the foregoing notice, inquiry or request, the person did not have knowledge that an investigation had commenced with respect to the disclosed information.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: June 9, 1986.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, June 25, 1986 (51 FR 23047)]

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19 CFR Part 134

(T.D. 86-120)

Effective Date for Country-of-Origin Marking Requirement on Orange Juice Containers

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final interpretive rule.

SUMMARY: This document informs the public that Customs has made its determination regarding an implementation date for the requirement that labels on frozen concentrated and reconstituted orange juice products which contain imported concentrate be marked to show the foreign country-of-origin of the products. The requirement for marking the products was recently upheld by the Court of International Trade. However, Customs was directed by the Court to seek comments from all interested parties before reaching a decision on an effective date for the requirement. The decision on implementation was made following careful analysis of the comments received in response to a published notice, as well as full consideration of the presentations made in a public hearing held on the subject of implementation.

The effective date for implementation of the marking requirement is February 1, 1987.

FOR FURTHER INFORMATION CONTACT: Lorrie Rodbart, Entry Procedures and Penalties Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5765).

SUPPLEMENTAL INFORMATION:

BACKGROUND

In response to a formal request, Customs published a ruling dated September 4, 1985, in the CUSTOMS BULLETIN of September 25, 1985 (C.S.D. 85–47, 19 Cust. Bull. No. 39 at 21), stating that retail packages of orange juice containing imported concentrate must be labeled to comply with the country-of-origin marking requirements of § 304, Tariff Act of 1930, as amended (19 U.S.C. 1304). The rationale for that decision is discussed in detail in the cited decision. That ruling was to be implemented for affected products entered for consumption or withdrawn from warehouse on or after January 1, 1986.

That implementation date was extended to March 1, 1986, by a notice published in the December 11, 1985, CUSTOMS BULLETIN (19 Cust. Bull. No. 50 at 15). The extension decision took into account the ruling's perceived economic impact on the manufacturing public, as well as the right of ultimate purchasers of affected juice products to be fully informed about the origin of those products. The March 1, 1986, date was nearly 6 months after the initial ruling had been issued, and was considered reasonable.

In a case brought by the National Juice Products Association, *et al.* challenging C.S.D. 85–47, *National Juice Products Association* v. *United States*, —— CIT ——, Slip Op. 86–13 (January 30, 1986), the Court of International Trade held that C.S.D. 85–47 was substantively valid. The Court, however, remanded the case to Customs for reconsideration of the effective date. The Court directed Customs to adhere to the notice and comment provisions of § 177.10(c)(2), Customs Regulations (19 CFR 177.10(c)(2)), and to carefully consider all possible issues relating to a reasonable time to implement the new ruling.

Accordingly, by notice published in the Federal Register on March 3, 1986 (51 FR 7285), Customs solicited comments related to the earliest practicable implementation date for the requirement that containers of orange juice in frozen concentrated or reconstituted forms, which contain imported concentrate, must be labeled to comply with the country-of-origin marking requirements of 19 U.S.C. 1304. Of particular interest was any information concerning the time it generally takes suppliers to provide new or changed labels and cans to the packagers of orange juice products, as well as the quantity of labels and printed retail containers usually kept in inventory. We also sought information as to whether the industry had already taken steps to procure new labels which satisfy the requirements of C.S.D. 85–47. The notice also announced that a public hearing was to be held on the implementation date issued at Customs Headquarters on March 28, 1986.

After careful analysis of the comments received in response to the notice, as well as full consideration of the presentations made

at the public hearing, a decision has been reached and an appropriate effective date determined. An analysis of the comments follows.

Analysis of Comments

Thirty eight comments were received in response to the notice, including written statements of the 13 witnesses who testified on this issue in the public hearing. Comments submitted on issues other than the effective date of C.S.D. 85–47 are outside the scope of the notice and therefore have not been addressed.

Most of the comments came from orange juice processors and label manufacturers. In addition, comments were received from various trade associations, one state agency, and other industry representatives. Although two commenters indicated that the implementation date has been extended enough to give the processing industry necessary lead time to comply with the requirements of C.S.D. 85–47, the remainder of the commenters advocated a substantial additional period of time to comply. The two reasons cited most often are that they need time to exhaust (or at least diminish) large inventories of non-complying packaging to avoid incurring large financial losses, and that they need time to obtain new labels. It is claimed that the necessary lead time to obtain new labels is directly effected by the so-called "supplier bottleneck". It is claimed that this "bottleneck" is created because the numerous firms engaged in orange juice processing in the U.S. use only a handful of labeling and packaging suppliers. Also, every company must change all their orange juice labels at the same time. These two factors are discussed in the following portions of this document.

Inventory

All of the label manufacturers and orange juice processors who commented indicated that they generally maintain substantial inventories of labels and packaging to meet their production needs and obtain quantity discounts. An analysis of the comments indicates that the time necessary to deplete these inventories ranges from about 2 months to one year, and that the cost of the inventory ranges from $20,000 to $9 million. The larger processors, because of their large production volumes, appear to have the largest inventories of non-complying packaging. It is argued that to the extent that the chosen implementation date does not permit full liquidation of existing inventories, processors' costs, and possibly consumer prices, will be increased.

Lead Time

Although both the label manufacturers and orange juice processors acknowledge that the normal lead time to obtain new labels generally is not more than 3 months (the actual time varying depending on the type of process that is used to manufacture the

label; rotogravure used for composite cans requiring the most time, pure-pak containers requiring the least time), it is claimed that two added factors will alter this considerably. The first is that each packager will have to redesign all of its labels at once. While some companies do not use many different labels, other companies, particularly those that distribute their products under private labels, use hundreds of different labels that will have to be changed. For example, one company indicates that it distributes orange juice under private labels or supermarkets across the country and uses 377 different containers. Another company, which sells under both private labels and its own brand name, indicates that it sells juice in 186 different types of cans and other containers. In order to change every label, it is claimed that a significant amount of time in addition to the normal lead time will be required.

The second factor that commenters indicate will alter the normal lead time is the "supplier bottleneck". It is claimed that there are only four or five major suppliers of labels for composite cans (the most widely used type of orange juice container) to service the entire industry. One of these suppliers indicates that it will take at least a year to make the necessary changes on its 225 labels for all its orange juice processor customers, while continuing to service its other customers. Another large label supplier estimates that it would take 2 years to make all necessary changes on its 525 labels while servicing other customers. Even if these companies were to devote all of their time to servicing their orange juice customers (an option which is claimed to be commercially unfeasible), it is claimed that the process would still take approximately 5 to 7 months to complete. One juice can manufacturer stated that it would require at least a year to change all 400 labels at once. Another packaging company indicated that it currently has a backlog of required sodium label changes and would not be able to start orange juice changes for at least 90 days.

One small orange juice processor expressed concern that it will be hurt unless Customs allows sufficient time for all companies to comply with the ruling. As orange juice processors compete for the attention of their labeling and packaging suppliers, there is speculation that the larger companies would be given priority.

The basic consensus of the commenters, with the exception of the two commenters that would like immediate compliance with the ruling, is that a minimum of one year is required to allow the industry's small number of packaging and labeling suppliers to meet orange juice processors' needs for new packaging bearing the required country-of-origin marking.

Lithographing the Ends of Cans

In order to address the problem of non-complying inventory and the lead time required to design all new labels, Customs, in response to a ruling request, authorized processors to lithograph the

top end of the can (*i.e.* the end which is opened by the consumer) with the country-of-origin information. It was our understanding that approval of such an alternative method of marking would shorten the time necessary for compliance. Many commenters addressed this point.

Although most commenters acknowledged that this alternative marking might be a useful short-term solution, they stated that it will not solve all the problems of complying with the ruling. First, some commenters indicated that this method of marking is not suited to certain types of containers (*i.e.* glass, pure-pak and plastic cup containers, and certain 6 and 12-ounce metal cans with adhesive pull tabs). An even greater concern was that such a method was not economically feasible. Although these commenters indicated that the initial start-up costs for lithography are not high, fixed costs would be incurred every time this operation was performed. (One company estimated that it would cost almost $100,000 a year; another company $190,000.) Conversely, it is argued that the cost of producing cylinders for new labels is a one time cost which could be amortized over millions of containers. Thus, the major processors indicated that with their large production volumes they would not benefit from this marking alternative. The consensus is that lithography would be most useful in short-term, small volume situations.

Other Comments

Several commenters indicated that Customs should adopt July 1, 1987, as the implementation date for C.S.D. 85-47. That is the next FDA-mandated "uniform effective date" for food labeling changes.

Finally, many commenters indicated that it would have been unwise to have taken substantial compliance efforts prior to the decision by the Court of International Trade on the legality of C.S.D. 85-47 and until Customs provided the industry with guidelines on some important compliance issues entailed in the September 4, 1985, ruling.

Customs Response

After carefully considering all the comments, we are satisfied that the industry needs additional time to comply with the requirements of C.S.D. 85-47. In view of the limited number of label and packaging suppliers, it would put a tremendous burden on the entire industry to establish an early compliance date. Because label suppliers cannot be expected to service only their orange juice customers, some consideration must be given to the estimates to these suppliers that it would take between 1 and 2 years to service the entire industry. We are also persuaded that lithographing of can lids will not be a long term solution for most companies. Therefore, we recognize that the lead time must take into account the fact that most companies, if not all, must develop, at a substantial cost,

new labels for all of their products. Most commenters indicated that this could be accomplished within a year. However, inasmuch as lithography of can tops is a short term marking solution for some smaller companies that may not be serviced immediately by the major label suppliers, it is not necessary to postpone implementation until the label manufacturers can provide every company with new labels.

Based on the data submitted by the commenters, we are also satisfied that orange juice processors as well as labels suppliers maintain a large inventory of packaging, and that it would be to everyone's benefit to substantially diminish those stockplies. The result of forcing the industry to discard this inventory would undoubtedly result in higher consumer prices. It appears that nearly all such inventory will be depleted within a year. In view of the lithography option, it is similarly unnecessary to postpone implementation until *all* non-complying inventory is depleted.

Finally, we are persuaded that the complexity and cost of labeling changes, and impracticability of adhesive labels, precluded the industry from taking final action to comply with C.S.D. 85–47 until the Court of International Trade rendered its opinion on the legality of the ruling. We do not agree that it was necessary to wait until every possible issue concerning compliance was resolved.

Determination

Based on the prevsiouly stated considerations, Customs has determined that C.S.D. 85–47 will become effective on February 1, 1987, approximately 1 year from the date the Court of International Trade rendered its decision. If the final repacked product or orange juice contains any foreign concentrate entered for consumption or withdrawn from warehouse on or after this date, the certification requirements of § 134.25, Customs Regulations (19 CFR 134.25), apply. Therefore, effective February 1, 1987, importers or orange juice concentrate must certify to Customs at the time of entry either that the retail package of orange juice will be properly marked with the country or origin, or that he will notify the repacker of the marking requirements.

Drafting Information

The principal author of this document was Larry L. Burton, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

William von Raab,
Commissioner of Customs.

Approved: June 12, 1986.
FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, June 25, 1986 (51 FR 23045)]

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19 CFR Part 178

(T.D. 86-121)

Customs Regulations Amendment to Listing of OMB Control Numbers

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to include the clearance number issued by the Office of Management and Budget (OMB), necessary for certain information collection requirements included in a recent interim amendment to the Customs Regulations. The interim amendment stated that an application for clearance was submitted to OMB. That office has since approved the regulation and issued the clearance number which appears in this document.

EFFECTIVE DATE: July 7, 1986.

FOR FURTHER INFORMATION CONTACT: Larry L. Burton (202-566-8237).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Parts 4, 6, 24, 111, 123, and 145, Customs Regulations (19 CFR Parts 4, 6, 24, 111, 123, and 145), were amended on an interim basis by T.D. 86-109, published in the Federal Register on June 11, 1986 (51 FR 21152). The amendments implement § 13031 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (the Act, Pub. L. 99-272), which establishes a schedule of fees chargeable to users of various services provided by the Customs Service in connection with the processing of persons, aircraft, vehicles, vessels, and merchandise arriving in the U.S., as well as for the payment of an annual fee by customs brokers. The Act also sets forth certain limitations or conditions concerning the collection of fees, and authorizes the promulgation of such regulations as necessary to carry out the provisions of the new law. Certain aspects of the interim regulations impose burdens upon segments of the public to make periodic reports and payments to Customs, as well as to maintain records for possible examination.

The Paperwork Reduction Act of 1980 (Pub. L. 96-511, 94 Stat. 2812, 44 U.S.C. 3501 *et seq.*) established polices and procedures for

controlling paperwork burdens imposed on the public by federal agencies. Pursuant to this Act, by a document published in the Federal Register on March 31, 1983 (48 FR 13666), the Office of Management and Budget (OMB) promulgated rules implementing the Act. The OMB rules are codified at 5 CFR Part 1320 *et seq.*

One aspect of OMB's oversight function is the review and approval of information collections. Generally, information collections include any requirement or request for persons to obtain, maintain, retain, report, or publicly disclose information. OMB analyzes such requests for three basic requirements. First, the collection of information must be necessary for proper performance of the agency functions. Second, the request for information or records must not duplicate information otherwise accessible to the agency. Third, the information must have practical utility.

When an information collection is approved by OMB, it is issued a control number. The control number provides a simple and effective way to inform the public that a particular information collection has been approved by OMB pursuant to the Paperwork Reduction Act.

In the June 11, 1986, interim regulations, Customs stated that the amendments were subject to the Paperwork Reduction Act, and that an application for approval was submitted to OMB. OMB was able to quickly review the information collection requirements included in T.D. 86–109, and has issued a control number. This document amends Part 178, Customs Regulations (19 CFR Part 178), by including that control number in the list of previously issued OMB numbers.

E.O. 12291, Regulatory Flexibility Act, Inapplicability of Public Notice Requirement

This document merely amends a listing of the status of previously published regulations. Therefore, the requirements of E.O. 12291, the Regulatory Flexibility Act, and the notice and public comment requirements of the Administrative Procedure Act (5 U.S.C. 552) are not applicable.

List of Subjects in 19 CFR Part 178

Reporting and recordkeeping requirements, Paperwork requirements, Collection of information.

Drafting Information

The principal author of this document was Larry L. Burton, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

157-868 0 - 86 - 2

AMENDMENT TO THE REGULATIONS

Part 178, Customs Regulations (19 CFR Part 178), is amended as set forth below:

PART 178—APPROVAL OF INFORMATION COLLECTION REQUIREMENTS

1. The authority citation for Part 178 continues to read as follows:

AUTHORITY: 5 U.S.C. 301, 19 U.S.C. 1624, 44 U.S.C. 3501 *et seq.*

2. Section 178.2 is amended by inserting, in proper numerical order, the following entries:

§ 178.2 Listing of OMB Control Numbers.

* * * * * * *

19 CFR Section	Description	OMB Control No.
§ 4.98(i)	Users fees for Customs services	1515–0154
§ 6.1a	Users fees for Customs services	1515–0154
§ 24.22	Users fees for Customs services	1515–0154
§ 111.96	Users fees for Customs services	1515–0154
§ 123.1a	Users fees for Customs services	1515–0154
§ 145.1a	Users fees for Customs services	1515–0154

Dated: June 18, 1986.

B. JAMES FRITZ,
Director,
Regulations Control and Disclosure Law Division.

[Published in the Federal Register, June 25, 1986 (51 FR 23050)]

(T.D. 86–122)

Notice of Revised Customs Form 3461, Entry/Immediate Delivery

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: This document advises the public that Customs has revised Customs Form 3461, now called, Entry/Immediate Delivery, so that it will contain sufficient information to be used in the automated cargo selectivity system. This system allows approximately 80 percent of imported merchandise to be released from Customs custody without actual examination. The revised form is also capable of integration into the Automated Commercial System which

will allow brokers and importers to file an entry and secure release of merchandise by computerized electronic data transfer. The revised Customs Form 3461 is reprinted as an attachment to this document.

EFFECTIVE DATE: The revised version of Customs Form 3461 may be used immediately. Previous versions can be used until September 2, 1986, after which only the revised form may be used.

FOR FURTHER INFORMATION CONTACT: Jerrald Worley or Shirley Rosen, Office of Cargo Enforcement and Facilitation (202–566–8151), or Dale Snell, Program Planning Staff (202–566–5865); U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

SUPPLEMENTARY INFORMATION:

BACKGROUND

All merchandise imported into the U.S., unless specifically exempted, must be presented to Customs for examination before it can be released from Customs custody and entered into the commerce of the U.S. Most merchandise is released upon presentation to Customs of an "entry" which contains sufficient information to identify the importer of record, make a written record of entry, and verify the existence of a bond to guarantee production of a follow-up entry summary together with the deposit of estimated duties, if applicable. Within 10 working days after release of the merchandise, entry summary documentation, together with the deposit of estimated duties, if applicable, must be furnished to Customs. This documentation enables Customs to properly classify and appraise the merchandise, as well as to collect necessary statistical information. Entry and release of merchandise are provided for in § 448, Tariff Act of 1930, as amended (19 U.S.C. 1448). The procedures relating to the entry process are set forth in Parts 141 and 142, Customs Regulations (19 CFR Parts 141, 142).

Customs Form 3461, entitled Immediate Delivery Application, is the source document now presented to Customs when making an entry. The form is filled out for each shipment of merchandise and presented to a Customs officer along with invoices and a right to make entry supported by a bond to obtain release of the merchandise. The information on this form allows Customs to verify that the correct shipment is released to the correct person, that it matches the carrier's manifest, and that an acceptable bond is on file.

As part of a continuing program to make the entry process more efficient, Customs developed an automated cargo selectivity system. This system currently allows approximately 80 percent of imported merchandise to be released without actual examination. This system stores information in our computers about certain categories of merchandise and about importers which are known, or sus-

pected to be involved in high risk, prohibited, or restricted importations. The current Customs Form 3461 does not contain sufficient information to be used in the selectivity program. Therefore, importers have been providing supplemental documents to Customs with the necessary information in order to expedite release of their shipments.

In an effort to reduce the paperwork burden on the public, and provide better service to carriers, brokers, and importers, after extensive negotiations with the National Customs Brokers and Freight Forwarders Association of America, Customs has revised the Customs Form 3461. The new version of the form, now called Entry/Immediate Delivery, provides for the numeric or alphabetic coding of information such as entry type, tariff classification, port of entry, carrier, and country of origin of the merchandise. This allows full integration into the automated cargo selectivity system and rapid processing and release of merchandise. The form is also aligned with the requirements of Customs Automated Commercial System which allows brokers and importers to file an entry and secure a release of merchandise through electronic data transfer. The revised form is also compatible with Optical Character Reader (OCR) equipment which, if introduced at a later date, will further speed processing.

The revised version of Customs Form 3461 may be used immediately. Previous versions can be used until September 2, 1986, after which ony the revised form may be used. The Customs Form 3461 Alternate has not been revised. The revised Customs Form 3461 is reprinted as an attachment to this document. Copies of the form and the instructions are also available from district directors of Customs pursuant to the provisions of § 24.14, Customs Regulations (19 CFR 24.14). For those wishing to print their own copies of the form, a specification sheet is included. The revised Customs Form 3461 has been approved by the OMB and assigned control number 1515-0069.

Drafting Information

The principal author of this document was John E. Doyle, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

William von Raab,
Commissioner of Customs.

Approved: June 18, 1986.

Michael H. Lane,
Acting Assistant Secretary of the Treasury.

TABS:

DEPARTMENT OF THE TREASURY
UNITED STATES CUSTOMS SERVICE

Form Approved
OMB No. 1515-0088

ENTRY/IMMEDIATE DELIVERY

19 CFR 142.3, 143.18, 143.22, 142.24

1. ARRIVAL D	2. ELECTED E Y DATE	3. E Y TYPE CODE/NAME	4. ENTRY NUMBER
5. PORT	6. SINGLE TRANS. BOND	7. BROKER/IMPORTER FILE NUMBER	
	8. CONSIGNEE NUMBER		9. IMPORTER NUMBER
10. ULTIMATE CONSIGNEE NAME		11. IMPORTER OF RECORD NAME	
12. CARR CODE	13. VOYAGE/ T/WAYBILL	14. LOCATION OF GOODS/ CODE(S)/NAME(S)	
15. VESSEL CODE/NAME			
16. U.S. PORT OF UNLADING	17. MANIFEST NUMBER	18. G.O. NUMBER	19. TOTAL VALUE
20. DESCRIPTION OF MERCHANDISE			

21.	22. IT/BL/AWB NO.	23. MANIFEST QUANTITY	24. TIB/SA NUMBER	25. COUNTRY OF O	26. MANUFACTURER NO.

27. CERTIFICATION

I hereby make application for entry/immediate delivery. I certify that the above information is accurate, the bond is sufficient, valid, and current, and that all requirements of 19 CFR Part 142 have been met.

SIGNATURE OF APPLICANT

X

PHONE NO. | DATE

28. BROKER OR OTHER GOVT. AGENCY USE

29. CUSTOMS USE ONLY

☐ OTHER AGENCY ACTION REQUIRED, NAMELY:

☐ CUSTOMS EXAMINATION REQUIRED.

☐ ENTRY REJECTED, BECAUSE:

DELIVERY AUTHORIZED: SIGNATURE DATE

Paperwork Reduction Act Notice: This information is needed to determine the admissibility of imports into the United States and to provide the necessary information for the examination of the cargo and to establish the liability for payment of duties and taxes. Your response is necessary.

Customs Form 3461 (112095)

SUMMARY SPECIFICATIONS FOR CUSTOMS FORM 3461

General Description—5-part marginally punched continuous form compatible with IBM 370/155 and typewriter. Part 1 to be compatible with Dest model 213 OCR reader.

Size—overall: Width 9½ inches, depth 11 inches.

PAPER, DESCRIPTION, COLOR OF INK

Part No.	Paper—Basis 500 sheets 17 x 22"			Ink
	Color	Kind	Sub. No. (latitude)	
1	White.....	CW Bond...	20	Sinclair Valentine Red J25083.
2	White.....	CW Bond...	9-10	Standard Black.
3	White.....	CW Bond...	9-10	Standard Black.
4	White.....	CW Bond...	9-10	Standard Black.
5	Yellow.....	CW Bond...	15	Standard Black.

(Note: Specifications for parts 2-4 same as previous edition of form.)

Joining—Crimp and firm glue left margin and crimp right margin.

Interleaving Carbons—Black narrow unpunched ⅜" short on left and ¾" short on right.

Perforations:

Marginal—½" from left and right side, parts only.

Tearline—Horizontal tearline perforations, parts and carbons, to be provided every 11" between forms.

Punching—5/32 inch diameter round holes spaced vertically ½ inch center to ¼ inch from left and right edges.

Revised February 1986.

[Published in the Federal Register, June 30, 1986 (51 FR 23617)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas

Senior Judges

Morgan Ford

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 86–62)

LUCIANO PISONI FABRBICA ACCESSORI INSTRUMENT MUSICIALI AND ENZO PIZZI, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Before DICARLO, *Judge.*

Court No. 84-10-01435

Plaintiffs challenge final affirmative determinations by the Department of Commerce, International Trade Administration (Commerce) and the International Trade Commission (Commission) that resulted in an antidumping duty order concerning woodwind instrument pads from Italy. Plaintiffs argue that Commerce erred in initiating the investigation and in continuing the investigation when it knew the petition failed to satisfy legal requirements, that Commerce did not compare the same merchandise in the Italian and United States markets, and that Commerce imposed margins resulting solely from currency fluctuations.

The Court holds that Commerce did not compare the same merchandise, and that a dumping margin may not result solely from currency changes. Since the margin may be eliminated on remand, the Court will not address plaintiffs' contention that the Commission improperly disregarded the size of the margin in finding material injury to a domestic industry.

[Plaintiffs' motion for judgment on the agency record is granted in part and denied in part. The action is remanded.]

(Decided June 12, 1986)

Klayman & Gurley, P.C. (*Larry Klayman,* and *John Gurley*) for plaintiffs.

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, Department of Justice (*Elizabeth Seastrum; Edward Madaj,* International Trade Commission, or counsel) for defendant.

Mudge, Rose, Guthrie, Alexander & Ferdon (*N. David Palmeter* and *Jeffrey Neeley*) for *amicus curiae* Hyundai Steel Ind. Co., Ltd.

Dewey, Ballentine, Bushby, Palmer & Wood, (*Alan Wm. Wolff, Jane Albrecht*) and *Akin, Gump, Strauss, Hauer & Feld,* (*Richard R. Rivers*) for *amicus curiae* Lone Star Steel Co.

MEMORANDUM OPINION AND ORDER

DICARLO, *Judge:* Plaintiffs, an Italian producer of woodwind instrument pads and its United States importer, challenge final affirmative determinations of the United States Department of Commerce, International Trade Administration (Commerce), *Pads for Woodwind Instrument Keys From Italy; Final Determination of*

Sales at Less Than Fair Value, 49 Fed. Reg. 28295 (1984), and the International Trade Commission (Commission), *Pads for Woodwind Instrument Keys from Italy,* Inv. No. 731-TA-152 (Final), USITC Pub. 1566 (1984), 49 Fed. Reg. 34313 (1984), that resulted in an order assessing an antidumping duty of 1.16% *ad valorem* on woodwind instrument pads from Italy. 49 Fed. Reg. 37137 (1984).

Plaintiffs make four arguments challenging Commerce's determination that woodwind instrument pads are being sold in the United States at less than fair value. Since the Court holds that Commerce unreasonably failed to make a merchandise adjustment under 19 C.F.R. § 353.16, and that a dumping margin may not be found to exist as a result of currency changes, the dumping margin may be eliminated following remand. Therefore the Court does not address plaintiffs' contention that the Commission improperly disregarded the size of the margin in its material injury determination.

I. Judicial Review

In reviewing an antidumping duty determination by Commerce, the standard of review is not *de novo.* Rather, the Court must hold unlawful any determination, finding, or conclusion found "to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1982). Under the substantial evidence standard for review of agency determinations, the Court must accept Commerce's findings if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Federal Trade Commission* v. *Indiana Federation of Dentists,* 54 U.S.L.W. 4531, 4533 (U.S. June 2, 1986). Substantial deference is granted to the agency in both its interpretation of its statutory mandate and the methods it employs in administering the antidumping law. *See American Lamb Co.* v. *United States,* 785 F.2d 994 (Fed. Cir. 1986); *Carlisle Tire & Rubber Co.* v. *United States,* 9 CIT ——, 622 F. Supp. 1070 (1985).

II. Commerce's Determination of Sales at Less Than Fair Value

A. *Commerce's Initiation of the Investigation*

Plaintiffs allege that the antidumping petition did not contain required price information and therefore should have been rejected by Commerce.

A petition must contain "information reasonably available to the petitioner supporting the allegations" of the "elements necessary for the imposition" of antidumping duties. 19 U.S.C. § 1673a(b)(1), (c)(1). A Commerce regulation, 19 C.F.R. § 353.36(a)(7), says that petitions "shall contain":

> All pertinent facts as to the price at which the foreign merchandise is sold or offered for sale in the United States and in the home market in which produced or from which

> exported * * * and if appropriate, information regarding sales in third countries or the cost of producing the merchandise. Petitioners unable to furnish information on foreign sales or costs may present information concerning U.S. domestic producers' costs adjusted for differences in the foreign country in question from information publicly available.

The petition contained: (1) home market (Italian) price lists for plaintiffs' pads, in dollars, dated January 1, 1982; (2) export price lists for petitioner's pads, in lira, dated December 1, 1982; (3) estimated home market cost of production data based on petitioner's actual 1976 costs when it manufactured in Italy; and (4) petitioner's cost of production data, current to September, 1983.

Plaintiffs say the price lists were not a sufficient basis to initiate the investigation because they were "out-of-date, not in effect, and clearly inapplicable to the U.S. and Italian markets as alleged." Plaintiffs' Reply Brief at 6. Plaintiffs contend that the fact that the Italian prices were listed in dollars and the United States prices were listed in lira particularly rendered the price lists an insufficient basis to initiate the investigation.

Commerce says that although the price lists submitted by the petitioner were suspect (Commerce later determined the price lists were mislabeled), they provided an adequate basis to proceed since prices on both lists were less than petitioner's cost of production. Commerce also argues it was reasonable to initiate an investigation on the basis of a comparison of price lists allegedly from 1982 with petitioner's 1983 cost of production data.

Commerce interprets the statutory requirement that the petition contain only information "reasonably available to the petitioner" as permitting Commerce to accept petitions from small businesses with less information that would be acceptable in petitions from large businesses. The Court finds this interpretation consistent with the intent of Congress. *See* S. Rep. No. 96-249, 96th Cong., 1st Sess. 47, *reprinted in* 1979 U.S. Code Cong. & Ad. News 433.

Also, Commerce has some discretion in deciding whether to initiate an investigation; Commerce is permitted to assess the sufficiency of the petition "in light of its own knowledge and expertise" and facts capable of judicial notice. *United States* v. *Roses, Inc.*, 1 Fed. Cir. 39, 46, 706 F.2d 1563, 1568-69 (1983). However, Commerce may not, as plaintiffs argue, accept a letter from plaintiffs' counsel arguing against initiating the investigation. *Roses* prohibits Commerce from considering such communications during the 20-day period Commerce has to decide whether to begin an investigation after the filing of the petition under 19 U.S.C. § 1673a(c). Plaintiffs' suggestion that *Gilmore Steel Corp.* v. *United States*, 9 CIT ——, 585 F. Supp. 670 (1984), "limits" *Roses* is in error, since *Gilmore* does not address preinitiation communications.

The Court holds that Commerce's decision to initiate the investigation was a "sufficiently reasonable" interpretation of the statute,

American Lamb Co. v. *United States,* 4 Fed. Cir. ——, 785 F.2d 995 (1986), and was in accordance with law.

B. *Commerce's Continuation of the Investigation*

Plaintiffs argue that Commerce should have rescinded the notice initiating the investigation when it learned that the petitioner failed to provide accurate price information. During the investigation, Commerce determined that one of the price lists furnished by petitioner was effective from 1976 to early 1980 instead of 1982, as alleged. Plaintiffs argue that once this information was discovered there was no longer any basis to conduct the investigation, and the notice of initiation should have been rescinded.

The statutory scheme offers no basis for plaintiffs' position that Commerce is required to rescind a notice of initiation of an investigation upon discovering inaccuracies in a petition. Once Commerce has commenced an investigation, it is obligated to "make a determination, based upon the best information available to it at the time of the determination, of whether there is a reasonable basis to believe or suspect that the merchandise is being sold, or is likely to be sold at less than fair value," 19 U.S.C. § 1673(b)(1) (1982). If the best information available, including the petition, affords no such reasonable basis, Commerce must make a negative preliminary determination of sales at less than fair value.

In making a final determination in an investigation, Commerce must verify all information on which it relies. 19 U.S.C. § 1677e (1982 § Supp. II 1984). Corrections to petitioners' data are the very point of verification procedures. It is therefore proper for Commerce to complete an investigation commenced after a petition is filed by an interested party even when a petition is found to contain inaccuracies. Since Commerce is authorized to commence an antidumping duty investigation *sua sponte* whenever it determines that an investigation is warranted based upon available information, 19 U.S.C. § 1673a(a) (1982), it would be unreasonable to require that Commerce terminate an investigation commenced after the filing of a petition by an interested party when, despite inaccuracies contained in the petition, it finds evidence of sales at less than fair value.

Plaintiffs' reliance on *Gilmore Steel Corp.* v. *United States,* 9 CIT ——, 585 F. Supp. 670 (1984) is misplaced. In that case the domestic plaintiff challenged Commerce's authority to terminate an investigation after initiation. Two months after issuing an affirmative preliminary determination, Commerce said that it believed plaintiff did not have standing to file a petition on behalf of a United States industry, and that the investigation should not have been initiated. The Court affirmed the power of Commerce to terminate investigations where such a fundamental defect in the petition comes to its attention after expiration of the 20-day review period. The Court did not hold, as plaintiffs claim, that Commerce has an obligation to terminate investigations if it finds inaccuracies in a

petition. The Court holds that Commerce's decision not to rescind the notice of initiation was in accordance with law.

C. *Commerce's Comparison of the Merchandise*

Plaintiffs also claim that Commerce compared different merchandise without making necessary adjustments for the differences of the merchandise.

In both Italy and the United States the price of different size pads is determined by the average size of pads in particular size ranges. A Commerce investigator explained the situation as follows:

> For example, the price for a 19mm saxophone pad when sold in Italy is based on the average size pad in the 14.5–20mm range, about 17.5mm. This same pad when sold in the U.S. falls in the 17.5–22mm range and thus its price is based on the average for that range, about 20mm. On the other hand, the price for a 21mm saxophone pad in Italy is based on the average size for the 20.5–30mm range, about 26mm, while the price in the U.S. for this pad, based on the 20mm average for its size range, would be the same as for the 19mm pad.
>
> The problem posed by this situation is that in comparing saxophone pads of the same size in these two markets, the facts that were the basis for the pricing decisions were different. In the above examples, a comparison of 19mm pads between Italy and the U.S. is in effect a comparison of the pricing decisions based on the costs of 17.5mm pads in Italy and 20mm pads in the U.S. A comparison of 21mm pads is a comparison of the pricing decisions based on the costs of 26mm pads in Italy and 20mm pads in the U.S.

R. Doc. 44, at 2–3.

Although Commerce said they compared the sales price of a particular pad size in the United States market with the sales price of the identical pad size in the home market, their comparison did not result, according to the investigator's report, in a comparison of identical pads sold in Italy and the United States. In its determination, Commerce said

> We did not consider an attempt to restructure the home market pricing to be appropriate, since it resulted in an adjustment for what appeared to be [plaintiffs'] deliberate pricing strategy in each of the markets under review.

49 Fed. Reg. 28,295; 28,298.

Plaintiffs say that Commerce was required to make either a circumstances of sale or a merchandise adjustment to allow for the comparison of different size pads. A circumstances of sale adjustment is not warranted, since the differences in the ranges of pad sizes in the two markets is not a "selling cost" similar to "credit terms, guarantees, warranties, technical assistance, servicing, and assumption by a seller of a purchaser's advertising * * *." 19

C.F.R. § 353.15(b). However, the Court holds that a merchandise adjustment was required.

The Commerce regulation providing for adjustments for differences in physical characteristics in the merchandise, 19 C.F.R. § 353.16, provides in part:

> In comparing the United States price with the selling price in the home market, or for exportation to countries other than the United States in the case of similar merchandise, due allowance shall be made for differences in the physical characteristics of the merchandise in the markets being compared. In this regard, the Secretary will be guided primarily by the differences in cost of production, to the extent that it is established to his satisfaction that the amount of any price differential is wholly or partly due to such differences, but, when appropriate, the effect of such difference upon the market value of the merchandise may also be considered.

Defendant does not argue that the ranges of pad sizes compared by Commerce were the same, but claims that Commerce has unlimited discretion to grant or deny merchandise adjustments under 19 C.F.R. § 353.13, which provides that any "person who alleges entitlement to any adjustment pursuant to sections 353.14 through 353.19 must establish entitlement thereto to the satisfaction of the Secretary." Defendant contends that plaintiffs failed to "establish a methodology which would permit that ITA to quantify the amount of such an adjustment." Defendant's Brief, at 39.

Commerce's discretion in making adjustments under 19 C.F.R. § 353.16 is not unlimited. Our appellate court has required that Commerce's decision whether to grant or deny an adjustment under section 353.16 must be "reasonable." *Smith-Corona Group, Consumer Products Division, SCM Corp.* v. *United States*, 1 Fed. Cir. 130, 144–45, 713 F.2d 1568, 1582 (1983). Moreover, Commerce performed a verification of plaintiffs' cost of production, which could have provided a basis for a merchandise adjustment under section 353.16.

The Court will not instruct Commerce how to compensate for the physical differences in the compared merchandise. However, the Court holds that Commerce's comparision of pads without allowing for differences in the physical characteristics of the different ranges of pad sizes was unreasonable and not in accordance with law.

D. *Commerce's Currency Conversion Methodology*

Finally, plaintiffs argues that Commerce is required to adopt a reasonable method of currency conversion for its ten home market sales during the period of investigation which does not create a dumping margin.

Plaintiffs say Commerce is obligated to do this for two reasons: (1) the purpose of the antidumping laws is to remedy unfair trade,

not to punish foreign producers selling for less than United States producers, and (2) a Commerce regulation requires that differences between prices caused by currency fluctuations be disregarded. The regulation provides:

> (b) *Special rules for fair value investigations.* For purposes of fair value investigations, manufacturers, exporters, and importers concerned will be expected to act within a reasonable period of time to take into account price differences resulting from sustained changes in prevailing exchange rates. *Where prices under consideration are affected by temporary exchange rate fluctuations, no differences between the prices being compared resulting solely from such exchange rate fluctuations will be taken into account in fair value investigations.* [Emphasis added.]

19 C.F.R. § 353.56(b). *See Melamine Chemicals, Inc.* v. *United States,* 2 Fed. Cir. ——, 732 F.2d 924 (1984).

Defendant argues that Commerce properly applied the general rule for currency conversions under § 353.56(a), basing exchange rates on quarterly rates published by the Secretary of the Treasury as provided by 31 U.S.C. § 5151 (1982). But in *Melamine,* the government argued, and the Court held, that 31 U.S.C. § 5151 applies only to the assessment and collection of duties, not to less than fair value investigations. 31 U.S.C. § 5151 does not compel Commerce to use quarterly rates.

Defendant says use of some other currency conversion method was not required under section 253.56(b) since the value of the lira compared to the dollar did not "fluctuate" during the period under investigation, but rather declined steadily, which should have served to reduce rather than create a margin. Plaintiffs agree that the depreciation of the lira would effectively decrease any margin, but argue that they were not permitted to reap the benefit of the lira's decline since Commerce based its conversion calculations on the exchange rate that prevailed on the first day of each quarter rather than on the lower rates which existed on the dates of each transaction.

In *Melamine,* our appellate court held that it was in accordance with the intent of Congress and within the authority of Commerce to adopt rules which would take into account exchange rate variables rather than rely on a mechanical conversion formula in determining dumping margins in less than fair value investigations:

> The purpose of the antidumping law, as its name implies, is to discourage the practice of selling in the United States at LTFV by the imposition of appropriately increased duties. That purpose would be ill-served by application of a mechinical formula to find LTFV sales, and thus a violation of the antidumping laws, where none existed. A finding of LTFV sales based on a margin resulting *solely* from a factor beyond the control of the exporter would be unreal, unreasonable, and unfair.

732 F.2d at 933 (emphasis in original).

It is not reasonable for Commerce to find dumping by a firm with only ten relevant home market sales during the period of the investigation solely because of Commerce's use of quarterly exchange rates. In this case the purpose of the antidumping laws would be violated if Commerce found a dumping margin based on the use of quarterly rates, while no margin would result if Commerce were to use the rates prevailing at the time of transactions.

At oral argument, the Court asked defendant whether the dumping margin of 1.16% would be reduced or eliminated if the exchange rates prevailing on the dates of the transactions had been used. Defendant filed with the Court a recalculation of the margin indicating that the margin would be .698%. Plaintiffs filed a motion to strike these calculations, objecting to the form and to alleged errors in the calculations. In response, defendant corrected one of the alleged errors, lowering the margin to .697. Since the Court orders the case remanded to Commerce on the merchandise adjustment issue, plaintiffs' motion to strike the calculation is denied as moot. Plaintiffs will be afforded an opportunity to comment on the result of the remand. *See Carlisle Tire & Rubber Co.* v. *United States,* 5 CIT 229, 564 F.Supp. 834 (1983).

III. Conclusion

The case is remanded to Commerce for action consistent with this opinion. Commerce will supplement the record and file in the Court its redetermination within 45 days from the issuance of this memorandum opinion and order. Plaintiffs will file any comments on the results of the remand within 15 days of the filing of Commerce's redetermination, and defendant will respond within 10 days of the filing of plaintiffs' comments.

So ordered.

(Slip Op. 86–63)

BOMONT INDUSTRIES, PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND ASAHI CHEMICAL INDUSTRY CO., LTD., INTERVENOR-DEFENDANT

Court No. 86–05–00557

OPINION AND ORDER

[Plaintiff's application for a preliminary injunction denied.]

(Dated June 17, 1986)

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart and *Mary Tuck Staley)* for the plaintiff.

Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Sheila N. Ziff)* for the defendant.

Barnes, Richardson & Colburn (James S. O'Kelly and *Gerard P. Burke, Jr.)* for the intervenor-defendant.

AQUILINO, *Judge:* Two producers of impression fabric from man-made fiber in Japan, namely, Asahi Chemical Industry Co., Ltd. and Shirasaki Tape Co., Ltd., were excepted from an affirmative dumping determination in 1978. *See* 43 Fed. Reg. 22,344 (May 25, 1978). The plaintiff domestic producer of nylon impression fabric and another company eventually filed a dumping petition with the Department of Commerce limited to sales from Asahi and Shirasaki. Thereafter, the International Trade Administration ("ITA") issued a final determination that "nylon impression fabric from Japan is not being, nor is likely to be, sold in the United States at less than fair value, as provided in section 731 of the Tariff Act of 1930, as amended". 51 Fed. Reg. 15,816 (April 28, 1986).

This action seeks judicial review of that determination pursuant to subsections (A)(i)(I) and (B)(ii) of 19 U.S.C. § 1516a(a)(2) and 28 U.S.C. § 1581(c).

Plaintiff's application for a temporary restraining order was denied after all parties were heard in open court. Thereafter, a hearing was held on plaintiff's application for a preliminary injunction. The proposed order submitted in conjunction with that application would enjoin liquidation of any nylon impression fabric produced by Asahi and Shirasaki and entered during the period April 28, 1986 through final resolution of this action by the court.

I

At both hearings, counsel for the defendant argued that any suspension of liquidation of entries during the pendency of this action would be "meaningless." [1] This position is articulated further in defendant's memorandum of law as follows:

> The suggestion that a favorable outcome for plaintiff in this action could possibly affect entries covered by a preliminary injunction suspending liquidation and could result in the retroactive assessment of antidumping duties on those entries betrays plaintiff's misunderstanding of the antidumping law. It is patent from the statutory scheme that the merchandise covered by the involved entries *will* enter the commerce of this of antidumping duties and beyond the reach of this country free Court, regardless of the outcome of this action or the issuance of a preliminary injunction. The reach of the antidumping law is *prospective only, not* retroactive, except in the limited situations where *provisional* measures (suspension of liquidation and imposition of provisional antidumping duties or a security deposit equal to the amount of the provisionally estimated antidumping duties) are allowed. Under the statutory scheme, these provisional measures may be imposed only after the pub-

[1] Transcript of proceedings on May 9, 1986 [hereinafter cited as "May 9 Tr."], p. 3; transcript of proceedings on May 23, 1986 [hereinafter cited as "May 23 Tr."], pp. 11, 12.

> lication of a preliminary affirmative determination by Commerce in an antidumping or countervailing duty proceeding.[2]
>
> * * * * * * *
>
> * * * [E]njoining liquidation of the involved entries upon plaintiff's application would be a futile exercise as those entries are beyond the reach of this antidumping litigation and of this Court and must ultimately be liquidated free of antidumping duties. Under these circumstances, issuance of a preliminary injunction would be contrary to the statutory scheme, the legislative intent, and an abuse of discretion.[3]

This position, which concentrates in the roles and responsibilities of the ITA and International Trade Commission ("ITC") for the imposition of antidumping duties under Subtitle B of Title I of the Trade Agreements Act of 1979, 93 Stat. 162–75, is clearly erroneous. Title X of that same statute provides for judicial review of the exercise of those roles and responsibilities. Section 1001(c)(2) thereof, now 19 U.S.C. § 1516a(c)(2), as amended, states that this Court of International Trade

> may enjoin the liquidation of some or all entries of merchandise covered by a determination of the * * * administering authority, or the Commission, upon a request by an interested party for such relief and a proper showing that the requested relief should be granted under the circumstances.[4]

Unless such liquidation is enjoined, subsection (c)(1) mandates that all entries be liquidated in accordance with the administrative determination. On the other hand, 19 U.S.C. § 1516a(e) provides:

> Liquidation in accordance with final decision—If the cause of action is sustained in whole or in part by a decision of the United States Court of International Trade or of the United States Court of Appeals for the Federal Circuit—
>
> (1) entries of merchandise of the character covered by the published determination of the Secretary, the administering authority, or the Commission, which is entered, or withdrawn from warehouse, for consumption after the date of publication in the Federal Register by the Secretary or the administering authority of a notice of the court decision, and
>
> (2) *entries, the liquidation of which was enjoined under subsection (c)(2) of this section,*

---

[2] Defendant's Memorandum in Opposition to Plaintiff's Application for Preliminary Injunction, p. 2 (emphasis in original).

[3] *Id.* at 10. *See also* Intervenor's Memorandum of Law in Opposition to Plaintiff's Application for a Preliminary Injunction, p. 4 ("no purpose would be served by suspending the liquidation of entries") and pp. 6–7 ("[t]he equitable relief sought by plaintiff can have no legal effect on current or future entries of Asahi's merchandise").

[4] Intervenor-defendant's contention at page 5 of its memorandum that "determination" means only an "affirmative" one is also clearly erroneous. Subsection (c)(2) is predicated upon "a determination described in paragraph (2) of subsection (a)". One such determination is a "final *negative* determination by the administering authority * * * under section * * * 1673d". 19 U.S.C 1516a(a)(2)(B)(ii) (emphasis added).

> *shall be liquidated in accordance with the final court decision in the action.* Such notice of the court decision shall be published within ten days from the date of the issuance of the court decision. [emphasis added]

The Court for Appeals for the Federal Circuit reaffirmed this clear-cut statutory rule in *Melamine Chemicals, Inc.* v. *United States,* 732 F.2d 924, 934 (Fed. Cir. 1984).[5] *See also Smith-Corona Group, Consumer Products Division, SCM Corporation* v. *United States,* 1 CIT 89, 96–99, 507 F.Supp. 1015, 1021–23 (1980).

II

The Report of the Committee on Ways and Means of the House of Representatives recognized that subsection (c)(2) made a "major change" in the law. H.R. Rep. 317, 96th Cong., 1st Sess. 182 (1979). But that report also stated that the change is not to be construed as granting the court authority to exercise the power in all situations, only "where appropriate". *Id.* Indeed, subsection (c)(2) codified the traditional judicial criteria for ruling on an application for a preliminary injunction as follows:

> * * * In ruling on a request for * * * injunctive relief, the court shall consider, among other factors, whether—
>
> (A) the party filing the action is likely to prevail on the merits,
>
> (B) the party filing the action would be irreparably harmed if liquidation of some or all of the entries is not enjoined,
>
> (C) the public interest would best be served if liquidation is enjoined, and
>
> (D) The harm to the party filing the action would be greater if liquidation of some or all of the entries is not enjoined than the harm to other persons if liquidation of some or all of the entries is enjoined.[6]

In other words, while Congress clearly understood that, in the absence of a preliminary injunction of the kind sought herein, entries "will escape assessment of dumping duties,"[7] it was unwilling to change the law other than where "extraordinary circumstances"[8] exist which still require analysis of the foregoing criteria for injunctive relief.

---

[5] Intervenor-defendant's memorandum of law cites (at page 11) this decision for another, appropriate proposition. Despite references to that case in the complaint itself (para. 46) and in plaintiff's reply brief (at pages 17–18), again for other reasons, intervenor-defendant's citation has been taken as an excuse by plaintiff's counsel to present a "Motion for Leave to File a Supplemental Statement to Plaintiff's Reply Brief". This motion is hereby denied, and no part of that statement is either referred to or relied on hereinafter.

The court received on June 16, 1986 a memorandum from defendant's counsel attempting to discuss *Melamine* for the first time. The absence of any prior reference to this case or the underlying statute, even after this court's mention thereof during colloquy on the application for a temporary restraining order [*see* May 9 Tr. at 7], constrains the court to now question whether defendant's counsel have intentionally disregarded the dictates of CIT Rule 11 as well as Canon 7 of the Lawyer's Code of Professional Responsibility in general and Ethical Consideration 7-23 and Disciplinary Rule 7-102(A) (2) and (5) in particular. Any such disregard will not be countenanced by this court in this or any other action brought before it.

[6] 19 U.S.C. § 1516a(c)(2) (1979) (sentence deleted by Customs Courts Act of 1980, Pub.L. 96–417, § 608(c), 94 Stat. 1746).

[7] H.R. ep. 317, 96th Cong., 1st Sess. 182 (1979).

[8] S. 249, 96th Cong., 1st Sess. 248 (1979).

Whether the analysis follows the order of those criteria as set forth in the statute, or as articulated in the Federal Circuit or formulated in other jurisdictions,[9] a crucial requirement is irreparable harm to the applicant. In *Zenith Radio Corporation* v. *United States,* 710 F.2d 806, 810, (Fed. Cir. 1983), the court concluded

> that liquidation would * * * eliminate the only remedy available to Zenith for an incorrect review determination by depriving the trial court of the ability to assess dumping duties on Zenith's competitors in accordance with a correct margin on entries in the '79–'80 review period. The result of liquidating the '79–'80 entries would not be economic only. In this case, Zenith's statutory right to obtain judicial review of the determination would be without meaning for the only entries permanently affected by that determination. In the context of Congressional intent in passing the Trade Agreements Act of 1979 and the existing finding of injury to the industry underlying T.D. 71–76, we conclude that the consequences of liquidation do constitute irreparable injury.

As indicated, that case arose out of a review of a fixed period pursuant to settion 751 of the 1979 act, 19 U.S.C. § 1675.

In an action such as the one at bar, liquidation of past entries at the proper rate of duty is not the "only remedy available". Rather, this proceeding can affect future entries. Thus, the court in *American Spring Wire Corp.* v. *United States,* 7 CIT 2, 578 F.Supp. 1405 (1984), concluded that the *Zenith* decision did not create an irrebutable presumption of irreparable harm. This is, an applicant for an injunction supending liquidations during judicial review of a negative administrative dumping determination must prove irreparable injury along with the other requirements for such extraordinary relief. *See, e.g., Timken Company* v. *United States,* 6 CIT 75, 569 F.Supp. 65, 69 (1983).[10]

At the hearings herein, plaintiff's attorneys, who were also counsel of record in both *American Spring Wire* and *Timken,* attempted to persuade the court that failure to suspend liquidation of Asahi and Shirasaki entries during the term of this action will cause their client irreparable harm. Despite an able presentation, they failed to bear their burden in this regard.

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[9] *Compare S.J. Stile Associates Ltd.* v. *Snyder,* 68 CCPA 27, 30, C.A.D. 1261, 646 F.2d 522, 525 (1981) *with* (1) *Ceramica Regiomontana, S.A.* v. *United States,* 7 CIT 390, 590 F.Supp. 1260 (1984):

> * * *Although the extraordinary remedy of a preliminary injunction is not available unless the moving party's burden of persuasion is met as to all four factors, the showing of likelihood of success on the merits is in inverse proportion to the severity of the injury the moving party will sustain without injunctive relief, *i.e.,* the greater the hardship the lesser the showing.

7 CIT at ——, 590 F.Supp. at 1264 (quoting from *American Air Parcel Forwarding Company* v. *United States,* 1 CIT 293, 300, 515 F.Supp. 47, 53 (1981)); *and* (2) *Texaco Inc.* v. *Pennzoil Company,* 784 F.2d 1133, 1152 (2d Cir. 1986):

> In this circuit the standard for issuance of preliminary injuctive relief is well-settled. The plaintiff has the burden of showing irreparable harm *and* (1) either probable success on the merits *or* (2) sufficiently serious questions going to the merits to make them a fair ground for litigation *plus* a balance of hardships tipping decidedly in the plaintiff's favor. * * * The effect of the grant or withholding of such relief upon the public interest must also be considered. [emphasis in original; citations omitted]

[10] That case also involved an annual review pursuant to section 751 of the 1979 act, but the complaint challenged the resultant administrative revocation of the antidumping duty order in contrast to *Zenith,* where the issue simply was the appropriate margin for such duty. *See Timken Company* v. *United States,* 4 CIT 263, 264, 553 F.Supp. 1060, 1061 (1982).

The evidence indicates that the plaintiff is having difficulty competing in the marketplace. It sustained a net loss in 1984, then achieved an operating profit for 1985; for the first four months of this year, the company experienced a drop in sales and a net loss.[11] At the May 23 hearing, the testimony focused on one particular customer of the plaintiff [12] which apparently has purchased competing merchandise from Shirasaki, but that testimony also indicated sales to the customer from domestic competitors. *See* May 23 Tr. at 55. In any event, the plaintiff was able to negotiate a substantial sale to that customer in March 1986, albeit at a price lower than a quotation for the same product at the end of 1985. *See* Hearing Exhibit 2.

In July 1985, the ITC reached a preliminary determination pursuant to 19 U.S.C. § 1673b(a) that there was a reasonable indication that the domestic industry is materially injured, or is threatened with material injury, by reason of imports from Japan of nylon impression fabric alleged to be sold at less than fair value. USITC Publication 1726 at 1 (July 1985). The determination is stated to have been based on findings, among others, of significant growth in demand for such fabric and of underselling by imports in a very price sensitive market. *See id.* at 3. The Commission concluded its report on the following note, however:

> There was a significant increase in the capacity of the domestic industry during the period of investigation. The entry of Milliken into the market as a fully integrated producer may accentuate this trend. This may have an impact on the analysis of the causal link between Japanese imports and the condition of the domestic industry.[13]

Of course, the question posed by the instant application is not whether the plaintiff is being injured by Asahi and Shirasaki imports, or whether those imports are being sold at less than fair value, but rather, to quote from the affidavit of plaintiff's president, whether

> admission of Japanese fabric into commerce in the United States without the possibility of offsetting dumping duties will prevent Bomont from recovering profitability, prolong its period of losses, deprive it of working capital, and threaten its very existence.[14]

If this is the gravamen of plaintiff's application, it prays for too much. And plaintiff's proof shows too little. That is, the evidence fails to support the thesis that lack of suspension of liquidation during the pendency of this action, in the hope of ultimate admin-

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[11] *See* Affidavit of Joseph A. Sullivan, para. 6, p. 4 (May 5, 1986) and Hearing Exhibit 1.

[12] The Sullivan affidavit outlines (in paragraph 8) recent sales experiences with some six other "major accounts".

[13] USITC Publication 1726 at 10, n. 37 (July 1985). The court notes in passing that the other domestic petitioner before the ITA has not joined in this action for judicial review.

[14] Sullivan Affidavit, para. 7.

istrative imposition of any antidumping duty, will cause the plaintiff irreparable injury. While the court recognizes that Asahi and Shirasaki merchandise may enter the United States during this period, there has been no attempt by the plaintiff to quantify the number of such entries which have occurred (or which will occur).

The plaintiff did attempt to compare its prices with those of the Japanese competitors, but the best evidence of the latter, a Shirasaki price list, is apparently two years out of date.[15] As for Asahi, the testimony at the May 23 hearing did not show sales to the one customer singled out for analysis. *See, e.g.,* May 23 Tr. at 56. Moreover, an affidavit of plaintiff's vice president for sales submitted originally to the ITA admits that he had no "specific price quote information on Asahi unslit fabric during the second half of 1985 or through the early part of 1986." Exhibit 9, para. 9 to Complaint.

That same affidavit specifies a Shirasaki price for the last quarter of 1985 *below* the price at which the plaintiff successfully negotiated the March 1986 sale referred to above. *Compare id.,* paras. 6–8 *with* Hearing Exhibit 2. On the other hand, another affidavit originally submitted to the ITA (and now Exhibit 10 to the complaint) describes in paragraph 4 a reduction in price in an attempt to compete with Shirasaki on another account. While this court does not yet have the administrative record before it, the magnitude of that reduction may well exceed the repair any appropriate antidumping duty could effectuate.[16]

As *Ceramica Regiomontana* and other cases show, *supra* page 7, note 9, there is an inter-relationship between the requisite showings of likelihood of success on the merits and irreparable harm for preliminary injunctive relief. Paragraph 28(b) of the complaint herein alleges that the petition to the ITA claimed dumping margins of 19.7 percent or less for the period investigated, but that allegation concedes price increases to the United States of 18.1 percent for the same time frame.[17] While these figures have been juxtaposed in support of the first count of the complaint claiming an unlawful failure by the ITA to investigate initially a period of time longer than the first six months of 1985, they barely support any claim of irreparable injury.

Time, of course, is an element of irreparability. Indeed, the plaintiff has also presented the court with a motion for expedition of this action. However, the Customs Courts Act of 1980, 28 U.S.C. § 2647, provided that actions such as this shall have precedence. While this statutory provision was repealed by Congress in Public

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[15] This document [Hearing Exhibit 7] was not offered for the contents thereof in any event, but only to indicate the type of information available to the witness in testifying within the meaning of Federal Rule of Evidence 701.

[16] The court notes that the ITA in its original determination (in 1977) found weighted-average margins of 0.15 percent for Asahi and 0.34 percent for Shirasaki, with the margins for the latter ranging from 0.3 to 4.3 percent. Asahi's weighted-average margin was considered to be *de minimis,* that of Shirasaki "minimal". 42 Fed. Reg. 65,345 (Dec. 30, 1977).

[17] *See also* Plaintiff's Memorandum of Points and Authorities in Support of its Application for a Temporary Restraining Order and a Preliminary Injunction, p. 15.

Law 98-620, effective November 8, 1984, pursuant to 28 U.S.C. § 1657 this Court of International Trade continues to grant such actions precedence. Furthermore, both 28 U.S.C. § 2635(d)(1) and CIT Rule 72(a) mandate that the defendant file the administrative record within forty days. When these requirements are compared with the year's time the Customs Service has at a minimum under 19 U.S.C. § 1504 to liquidate entries, any irreparable harm to the plaintiff due to lack of suspension of liquidation becomes even less discernible.

Failure of an applicant to bear its burden of persuasion on irreparable harm is ground to deny a preliminary injunction, and the court need not conclusively determine the other criteria. *See, e.g., National Corn Growers Association* v. *Banker,* 9 CIT ——, 623 F.Supp. 1262, 1275 (1985); *American Air Parcel Forwarding Company* v. *United States,* 6 CIT 146, 573 F.Supp. 117, 122 (1983). However, in view of the inter-relationship of this criterion with the merits, the court is not persuaded now that the plaintiff is so likely to succeed on the merits as to make the showing of irreparable harm a conceptual formality.

In view of the foregoing, plaintiff's application for a preliminary injunction must be denied.

So ordered.

ABSTRACTED C

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	A
				Item
C86/96	Restani, J. June 6, 1986	FAG Bearings Corp.	83-6-00793	Item 12.2 10
C86/97	Restani, J. June 6, 1986	FAG Bearings Corp.	83-12-01781	Item 10.6
C86/98	Restani, J. June 6, 1986	FAG Bearings Corp.	84-11-01665	Item 9.8%
C86/99	Newman, S.J. June 6, 1986	Intergram	83-7-01080, etc.	Item 17%
C86/100	Newman, S.J. June 6, 1986	North American Foreign Trading Corp.	85-4-00519	Item Free te Item 4.7% pe
C86/101	Restani, J. June 9, 1986	FAG Bearings, Ltd.	83-1-00106	Item 11.4
C86/102	Newman, S.J. June 9, 1986	C.J. Tower & Sons of Buffalo, Inc.	82-3-00275	Item 11.8
C86/103	Aquilino, J. June 13, 1986	S. Betesh & Co.	82-2-00197	Item 20%
C86/104	Newman, S.J. June 16, 1986	Terumo Corp.	84-8-01168, etc.	Item 13%

ED CLASSIFICATION DECISIONS

ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
Item No. and rate	Item No. and rate		
Item 680.39 12.2%, 11.4%, 10.6%	Item 680.33 5.8%, 5.6%, 5.3%	FAG Bearings, Ltd. v. U.S., Slip Op. 85–52	Buffalo Combination ball/roller bearings with integral shafts
Item 680.39 10.6%, 9.8%	Item 680.33 5.3% or 5.1%	FAG Bearings, Ltd. v. U.S., Slip Op. 85–52	Buffalo Combination ball/roller bearings with integral shafts
Item 680.39 9.8% or 8.9%	Item 680.33 5.1% or 4.9%	FAG Bearings, Ltd. v. U.S., Slip Op. 85–52	Buffalo Combination ball/roller bearings with integral shafts
Item 648.82 17%	Item 648.97 10.3%	Agreed statement of facts	Los Angeles 5-piece plier sets
Item A684.62 Free of duty for telephone Item 688.36 4.7% for clock portion	Item A684.62 Free of duty for telephone and clock portion	Agreed statement of facts	New York Modular Desk/Wall Telephone
Item 680.39 11.4%	Item 680.33 5.6%	FAG Bearings Ltd. v. U.S., Slip Op. 85–52	Detroit Combination ball/roller bearings with integral shafts
Item 682.25 11.8%	Item 682.30 5.8%	Agreed statement of facts	Buffalo-Niagara Falls Motors
Item 706.24 20%	Item 706.23 6.5%	Agreed statement of facts	New York Linen handbags
Item 709.27 13% or 14.2%	Item 709.09 5.1% or 5.3%	Agreed statement of facts	Los Angeles Surflo I.V. and Coaxial Dual Flow Catheters

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASI VALU
V86/171	Watson, J. June 6, 1986	Boghosian Bros.	274869, etc.	Export val
V86/172	Watson, J. June 11, 1986	American Custom Brokerage Co.	R63/11835	Export val
V86/173	Watson, J. June 11, 1986	Kowa American Corp.	R63/7708, etc.	Export val
V86/174	Watson, J. June 12, 1986	Harben Co.	R63/3593, etc.	Export val
V86/175	Newman, S.J. June 12, 1986	Mitsubishi International Corp.	81-9-01285, etc.	American price
V86/176	Newman, S.J. June 12, 1986	Mitsubishi International Corp.	82-4-00489	American price
V86/177	Newman, S.J. June 12, 1986	Mitsubishi International	82-9-01345, etc.	American price
V86/178	Newman, S.J. June 12, 1986	NSI, Inc.	84-12-01783	Transactio

CTED VALUATION DECISIONS

BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
ort value	F.o.b. invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values, net packed, or appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	San Francisco Rugs
ort value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Honolulu Transistor radios together with their accessories and parts; an entirety
ort value	F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Transistor radios together with their accessories and parts; an entirety
ort value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Chicago Transistor radios together with their accessories and parts; an entirety
erican selling rice	Appraised values less 22%, per pair	Agreed statement of facts	Los Angeles Footwear
erican selling rice	Appraised values less 22%, per pair	Agreed statement of facts	New York Footwear
erican selling rice	Appraised values less 22%, per pair	Agreed statement of facts	Seattle Footwear
nsaction value	Equal to invoice value	Agreed statement of facts	Savannah Needle equipment

NOTICE

The Procedural Handbook of the United States Court of International Trade, prepared by the staff of the Office of the Clerk, is now available. The Handbook provides basic information for the practitioner in processing actions under the court's Rules. It is intended to serve solely as a convenient guide and reference source, which consolidates and summarizes various procedures before the court.

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(or) COUNTRY

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